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In the Supreme Court of the United States

OCTOBER TERM 1964

CARL MICHAEL MIRABILE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals is reported at 330 F. 2d 676.

JURISDICTION

The judgment of the court of appeals was entered on April 14, 1964. By order of Mr. Justice Black, the time for filing a petition for certiorari was extended to and including July 10, 1964. The petition for a writ of certiorari was filed on July 8, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

740-265—64

QUESTIONS PRESENTED

1. Whether the district court's interrogation, in chambers, of four members of the panel from which petitioner's jury was chosen with respect to an acquittal in an earlier case prejudiced petitioner's trial even though those interrogated were not on petitioner's jury and did not mention the interrogation to others on the panel.

2. Whether the cross-examination of petitioner and the government's closing argument required the declaration of a mistrial.

STATEMENT

Petitioner and a co-defendant were indicted in the United States District Court for the Southern District of Texas for conspiracy to smuggle marihuana into the United States, the substantive offenses of smuggling and transporting marihuana without payment of the required transfer tax (21 U.S.C. 176(a), 4744(a)(2)). The co-defendant pleaded guilty. After a trial by jury in which the court submitted only the conspiracy count to the jury (R. 172–174), petitioner was convicted and sentenced to imprisonment for a period of five years (R. 187–188). The court of appeals affirmed, with one judge dissenting.

1. On September 14, 1962, ten days before petitioner's trial began, a jury in the same district court deliberated for eleven minutes, and then acquitted a defendant of failing to register with customs as a person previously convicted of a narcotics offense (R. 10–12). On September 17, when the panel from which that jury had been selected was reassembled, the

court excused the panel for three days, but asked four of those who had sat on the earlier case to meet with him at 1:15 p.m. Those asked to appear were called by name, and no express reference was made to the earlier trial (R. 9, 12–13). Petitioner then moved to quash the panel on the ground that the court's action had conveyed the impression that jurors would be called into the court's chambers to discuss their verdict if they acquitted a criminal defendant (R. 7–10).

At a hearing on the motion the judge stated that he had inquired of the four members of the panel whether they had given thorough consideration to the case and whether any outside influence had been brought to bear upon them. Petitioner's counsel then questioned the four former jurors out of the presence of the remainder of the panel. They all denied that they had discussed their conference with the judge with any other members of the panel. The four former jurors were then removed from the panel from which petitioner's jury was chosen (R. 15–25).

2. The government's evidence may be briefly summarized: Hector Rodriguez, a cabdriver from Monterrey, Mexico, testified that he met petitioner and co-defendant Nicolas Borozzi on a Monterrey street one Sunday afternoon in April 1962. Borozzi asked him where he could get marihuana. Rodriguez then introduced him to a seller. On the following day the marihuana was delivered, and the four met at the Regina Motel with another Mexican, Verduzco, who agreed to carry it across the border if he were well paid

(R. 26–35). Petitioner then tried to transfer the marihuana from a sack to a blue suitcase, but it would not fit into the suitcase. Borozzi succeeded in squeezing the marihuana into the suitcase, and he then paid the seller (R. 36, 37, 43).

In petitioner's presence Borozzi and Verduzco discussed the best way to bring the marihuana across the border. Verduzco suggested that he take it by bus to Nuevo Laredo (R. 37–39). Borozzi engaged Rodriguez to accompany Verduzco, paying him twenty dollars (R. 41). Petitioner gave Rodriguez a pistol (introduced into evidence) and two boxes of cartridges (R. 43–44). All four then went to the bus stations to inquire about bus departures for Laredo (R. 45–46). After checking out of the motel, they returned to the bus station. The two Mexicans boarded the bus, taking the suitcase and agreeing to meet Borozzi and petitioner at Nuevo Laredo (R. 46).

The bus arrived at Laredo at about 6:30 or 7:00 a.m. Borozzi took charge of the suitcase, and all four checked into the Vera Cruz Hotel. In petitioner's presence, Borozzi and Verduzco again discussed how to take the marihuna across the border. When Verduzco advised that it should be transported in the innertube of a tire, petitioner went to the American side of the border to obtain one (R. 47–49). That evening, all four met near the river, where Verduzco and Borozzi talked together outside the car for about forty-five minutes. Verduzco told Rodriguez that the marihuana would cross at eight o'clock. Rodriguez

then went back to the hotel and saw no more of Borozzi or petitioner (R. 50–51).

Shortly after 8:00 p.m. on April 10, 1962, about a half mile down river from the International Bridge at Laredo, American border patrol officers heard a whistle on the American side of the river, followed by a similar whistle on the Mexican side. A man was seen coming out of the brush on the Mexican side, and then was observed swimming across. After dressing, he started through the brush, carrying a suitcase. He was apprehended and eventually identified as Borozzi. The suitcase was filled with marihuana (R. 64–67, 103).

On April 12, customs officers interviewed petitioner at an address in Baltimore, Maryland, where Borozzi lived. Petitioner said that he was there to see his wife, who was helping care for a baby recently born to the woman living with Borozzi. Petitioner then stated that he had not been out of Baltimore "for weeks." At a later interview, he admitted that he had gone to Mexico with Borozzi, who had offered him $100 to drive him there. He said they were making the trip "to cop some pot and get high" (R. 87–88, 93, 96–97).

Petitioner testified in his own behalf that at the invitation of Borozzi he had gone on a vacation trip to Mexico, with the intention of smoking marihuana while there (R. 105). He testified that he had no proprietary interest in the marihuana, but had helped packed it in the suitcase at Borozzi's request (R. 114).

3. On cross-examination, petitioner was asked

whether his employment as a bartender was his sole source of income. He replied that it was. He admitted knowing a woman named Sarah Shapiro or Sally O'Malley, who was a barmaid at a night club. At this point, petitioner's counsel objected to the line of questioning on the ground that "I don't know what they are going to bring out." Government counsel stated that he wanted "to show that he does have other means of income." The court permitted the inquiry to proceed (R. 120–121). Petitioner was then asked, "She is also a prostitute, is she not?" He replied, "I don't know." In answer to further questions, petitioner admitted that he had borrowed money from this acquaintance occasionally, that she had lent him the money for a down payment on the car which he drove to Mexico, and that she owned the car (R. 120–122). At no point during this inquiry was there any other objection by petitioner's counsel.

4. In summation, petitioner's counsel argued (R. 151):

> But they said they must have gone down there to get marihauna. Now, where is a shred of evidence that this boy had a market for eighteen pounds of marihuana in Baltimore? Oh, he used marihuana, he smoked marihuana, and he admits it. But eighteen pounds of marihuana portends a commercial venture; and where is the slightest shred of evidence that this fellow had a market for eighteen pounds of marihuana?

Government counsel responded to this argument in rebuttal as follows (R. 166):

> They asked you the question, would this man have a market for eighteen pounds of marihuana? I submit he has. As a bartender in Baltimore, he could sell it just every day. If you are working Sally O'Malley, you can certainly get rid of it.

Petitioner's timely objection to this argument was sustained, but a motion for a mistrial was denied (R. 166). In charging the jury, the court said (R. 181):

> There has been testimony referred to in the argument by the Government's counsel which suggests that he perhaps was living in part at least off the earnings of a prostitute. He is not charged with that offense. It is an irrelevant matter which apparently crept in when I was unaware as to what was coming. I will ask you not to consider that testimony as to that circumstance for any purpose.

ARGUMENT

1. Contrary to petitioner's contention (Pet. 5), the evidence did not make this case "a close one." Petitioner was present during at least two discussions between Borozzi and Verduzco regarding the preferable method for smuggling the marihuana. He admitted having assisted in packing the narcotics into the suitcase which he lent to Borozzi (R. 133). He

neither denied nor explained his action in giving a revolver and cartridges to Rodriguez. This evidence, together with whatever inferences the jury could draw as to the purpose of petitioner's quick trip from Baltimore to Mexico, was certainly sufficient to sustain petitioner's conviction for conspiracy—the only charge submitted to the jury.

2. The private interrogation of the four jurors who had served in the earlier case could not possibly have prejudiced petitioner, and the court of appeals was correct in considering that contention "farfetched, indeed, frivolous" (Pet. App. 4). The remainder of the panel knew only that four members—identified by name and not by their participation in the earlier trial—had been asked to speak to the judge. None of those interrogated spoke to the other members of the panel regarding the subject of their interview, and there is not the slightest reason to believe that any other member of the panel thought that the interview was related to the previous jury service of the persons who were thus singled out. The four were stricken from the list of possible jurors for petitioner's case, so that their personal reactions to the court's interrogation could not have prejudiced petitioner.

3. In light of the strong evidence of guilt and the failure of petitioner's counsel to make timely objections, the court of appeals properly concluded that the district court's instructions cured whatever prejudice might have been caused by the improper cross-examination and rebuttal argument by government counsel. The instruction clearly informed the jury that it was

"not to consider that testimony as to that circumstance for any purpose" (R. 181).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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